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IN THE
Supreme Court of the United States

OCTOBER TERM, 1944

No. 470

AMERICAN POWER & LIGHT COMPANY,
Petitioner,
against

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF PETITIONER

A. J. G. PRIEST,
R. A. HENDERSON,
JAMES S. REGAN,
Attorneys for Petitioner,
Two Rector Street,
New York 6, N. Y.

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The Opinion Below

The opinion of the Circuit Court of Appeals for the First Circuit was rendered on June 19, 1944, and is reported at 143 F. (2d) 250.

Jurisdiction

The jurisdiction of this Court is invoked under Section 24(a) of the Public Utility Holding Company Act of 1935

(49 Stat. 803, 834-5; 15 U. S. C. § 79x(a)) and Section 240(a) of the Judicial Code, as amended (28 U. S. C. § 347(a)).

The Petition for Writ of Certiorari was filed September 16, 1944, and was granted November 13, 1944.

The Writ brings before this Court the order of the United States Court of Appeals for the First Circuit dismissing the Petitioner's Petition for Review of an order of the Securities and Exchange Commission (hereinafter called the "Commission"). The Court below dismissed the Petition for Review on the ground that the Petitioner, American Power & Light Company (hereinafter sometimes called "American") had no right to judicial review of the Commission's order, notwithstanding that the purpose and effect of the order was to prevent Florida Power & Light Company from paying dividends to the Petitioner on its stock, all of which is owned by American. The one question before this Court at this time is the Petitioner's standing to maintain the Petition for Review.

Statute Involved

The statute involved is the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C. § 79), hereinafter referred to as the "Act." The portion of that Act which is directly involved is Section 24(a) thereof (15 U. S. C. § 79x(a)), which reads in part as follows:

"Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part"

Statement of the Case

Description of the Petitioner

The Petitioner, American, is a corporation organized under the laws of the State of Maine, which registered as a holding company under the Act in 1938.

The Petitioner owns practically all the common stocks and some other securities of 14 corporations which are operating electric (and, in a few instances, gas) public utilities. The Petitioner is the only stockholder and owns all the issued and outstanding capital stock of Florida Power & Light Company (hereinafter referred to as "Florida").

Florida is an operating electric and gas utility conducting its business solely in the State of Florida. Florida's outstanding securities (after full compliance with the order of the Securities and Exchange Commission, other than the two paragraphs therein which are involved in this case and which are declared by the order to be separable from the remainder thereof) consist of \$65,000,000 of debt and the common stock owned by the Petitioner. It has assets of approximately \$100,000,000.

The Proceedings Before the Commission

The Securities and Exchange Commission (hereinafter called the "Commission") by its initial order of July 10, 1941, commenced proceedings, to which it made Petitioner a party, together with its subsidiary, Florida, and Electric Bond and Share Company. This initial order of the Commission raised issues which included "the necessity for stopping dividends on preferred and common stocks held by American * * *."

On August 8, 1941, after the Commission instituted the proceedings against American and the other two com-

panies, American and the other two companies proposed to the Commission a financial reorganization program for Florida, which involved substantial voluntary capital contributions by American to Florida and a refinancing of the bonds and the retirement of the preferred stock of Florida. American and Florida filed formal applications in connection with that program.

The Commission consolidated the proceedings instituted by it with the proceedings based on the reorganization program proposed by American and Florida. The Commission made both American and Florida parties to the consolidated proceedings.

Throughout the proceedings, American participated actively through witnesses and counsel, and presented evidence in its own behalf. At the hearings in those proceedings and in briefs, American offered contentions with respect to the particular matters discussed in this brief. Those contentions the Commission rejected.

The Commission's Order and the Petitions for Review Thereof

The consolidated proceedings culminated in the order of December 28, 1943, which so far as germane to the issue here, directed Florida (paragraph 2), first to take out of its surplus the sum of \$1,815,655. It directed Florida to do this (paragraph 3) by retaining out of earned surplus 1/12 of that sum in each month of 1944. Secondly, it directed Florida to appropriate annually out of surplus (paragraph 4) the sum of \$700,000, until approximately \$10,000,000 had been so appropriated.

American, as a result of the reorganization which involved substantial contributions by it to the capital of Florida, became the sole stockholder of Florida, and properly expected that any order which had the effect of depriving it of dividends on its stock would be subject to judicial

review upon petition by it. American, as the sole stockholder, is now deprived by the order in question of any dividends by way of distribution of the surplus of Florida to the extent of approximately \$12,000,000.

The order states specifically (paragraphs 3 and 4) that compliance with the order so restricting surplus and requiring the appropriation from surplus of \$700,000 per year was to be without prejudice to *respondents'* right to contest paragraphs two and four. The order, as so written, refers to the right to contest the Commission's action on behalf of *both respondents*, namely, American and Florida. The purpose was to permit consummation of the reorganization program without precluding review of the paragraphs specified.

American filed its Petition for Review in the Circuit Court of Appeals for the First Circuit on February 3, 1944. Thereafter, Florida on February 25, 1944, filed its Petition for Review of these orders by the United States Circuit Court of Appeals for the Fifth Circuit.

On February 24, 1944, the Commission moved to dismiss the petition of American filed in the First Circuit.

On June 19, 1944, the Circuit Court of Appeals for the First Circuit issued its opinion and order directing that American's Petition for Review be dismissed upon the ground that the Petitioner was not a "person or party aggrieved" within the meaning of Section 24(a) of the Act.

For convenience, paragraphs 2 and 4 of the order of the Commission dated December 28, 1943 (R. 8-12), of which Petitioner seeks judicial review, and paragraph 3 thereof, which connects those paragraphs, are here set forth as follows:

"(2) IT IS FURTHER ORDERED that Florida Power & Light Company shall classify in Account 107 and eliminate from the plant account by charge to earned

surplus not later than December 31, 1944, an amount of \$1,815,655 consisting of capitalized intra-system profits paid to affiliated companies as construction and engineering fees;

“(3) IT IS FURTHER ORDERED that Florida Power & Light Company, as a provisions for the disposition of the capitalized intra-system profits ordered in paragraph (2) above to be classified in Account 107 and eliminated from the plant account by charging to earned surplus, shall each month during the calendar year 1944 retain out of, and shall restrict, earned surplus in an amount of not less than one-twelfth ($1/12$) of \$1,815,655 until such time as a total of \$1,815,655 shall have been retained and restricted and shall indicate by appropriate footnotes to all published financial statements that its earned surplus is subject to that restriction; compliance with such order so restricting surplus to be without prejudice to respondents' right to contest the classification of said \$1,815,655 in Account 107 and the elimination of such item;

“(4) IT IS FURTHER ORDERED that pending final determination of the amount and disposition to be made of Account 100.5 items presently in the plant account of Florida, Florida shall annually beginning with the calendar year 1944 appropriate out of earned surplus to a contingency reserve at least \$700,000, such act of appropriation to be without prejudice, however, to respondents' right to contest the validity of any definitive order with respect to such items as may ultimately be issued;”

The Question Presented

Is Petitioner a person or party aggrieved by paragraphs numbered 2 and 4 of the order of the Commission dated December 28, 1943, within the meaning of Section 24(a) of the Act, and so entitled to independent judicial review thereof?

Specification of Error to Be Urged

The Circuit Court of Appeals for the First Circuit erred in holding that the Petitioner was not a person or party aggrieved within the meaning of Section 24(a) of the Act, and that, therefore, it was not entitled to a judicial review of paragraphs numbered 2 and 4 of the said order of the Commission.

Summary of Argument

American is a person or party aggrieved within the meaning of Section 24(a) of the Act.

Respondent admits that American has a substantial interest which is affected by the order.

The Court below erroneously substituted for the words and intent of the Act the rule of judicial decisions governing actions by minority stockholders on behalf of their corporations.

The said rule of judicial decisions with respect to independent minority stockholders' actions is inapplicable because

- 1) The statute clearly gives the right of judicial review to any aggrieved party;
- 2) Here the petitioner as sole stockholder suffers deprivation of dividends and loss in value of its stock, both injuries being peculiar to it; and
- 3) The petitioner, as the possessor of an interest which made it a necessary party to the administrative proceedings, is a party directly aggrieved.

The opinion below deprives petitioner of its right of judicial review in violation of the due process provisions of the Fifth Amendment of the Federal Constitution.

Argument

American is a "person or party aggrieved" by the order of the Commission, within the meaning of Section 24(a) of the Act.

The Court below, in holding to the contrary, refused to carry out the intention of Congress as expressed in unequivocal language in the statute.

American was a party to the proceedings before the Commission from their very inception, having been named by the Commission as a respondent, so that there is no question here as to whether a "person or party" includes a person who was not a party to the proceeding before the Commission. Therefore, the only issue before this Court is whether American is "aggrieved" by the provisions of the order sought to be reviewed.

Since it is unquestionable that the Commission's order has a substantial adverse economic effect on American (and the Commission has so conceded as will hereafter appear), it does not seem to us debatable that American is "aggrieved" by the provisions of the Commission's order which were entered over its vigorous protests. This would be true even if American suffered no injury from the Commission's order other than through the effect of the order on Florida, of which American is the sole stockholder. But American here has also suffered a direct and primary injury since the purpose and effect of the portion of the Commission's order sought to be reviewed was to restrict payment of dividends by Florida to American by making approximately \$12,000,000 unavailable for that purpose. Therefore, while the provisions of the order sought to be reviewed are in the first instance directed to Florida, the injury resulting from carrying out those provisions is suffered by American.

The provisions of the order which are sought to be reviewed direct Florida to charge off large amounts of its earned surplus and thereby make cash, equivalent to those sums, unavailable for payment as dividends. Thus, Florida is ordered to retain large sums of money as against American, its sole stockholder, which would otherwise be the only person or party entitled to receive the money as dividends. Yet in this situation the Court below has held (a) that Florida, which is ordered to keep the money in question, is the only one entitled to appeal from these provisions of the order, and (b) that American, the stockholder which is being deprived of dividends in the amount which Florida is ordered to retain, has no standing to appeal from the order. The effect of the decision dismissing American's Petition for Review is to deny a review to the party which is injured by these provisions of the order.

The inequity of the decision below denying American the right to seek review of the order is emphasized by the fact that American was made a party to the proceeding by the Commission at the very inception of the proceeding, that it actively participated therein throughout, and that the provisions of the order which are sought to be reviewed specifically recite that dispositions made therein are without prejudice to *respondents'* right to contest the order. After having thus been made a party by the Commission to the proceeding and having been heard by the Commission which thereupon overruled its contentions, and having had its right to judicial review appropriately preserved, American now has been held not to be "aggrieved" by the order and to have no interest sufficient to entitle it to judicial review of the order.

In arriving at its decision, the Court below held that the rule applicable to ordinary lawsuits against a corporation, namely, that those lawsuits must be defended, and judgments therein against the corporation appealed from,

by the corporation and not by its stockholders, was applicable to review of the order here in question. We submit that in so holding that Court fell into plain error. It gave no effect to the specific language which Congress inserted in Section 24(a) of the Act broadening the right to seek review by granting it to any "person or party aggrieved."

Moreover, the Court below failed to give effect to the difference between a situation where a money judgment is entered against a corporation directing the corporation to pay money from its treasury to a third person; and a situation, like the present one, where a company is ordered to retain money as against its stockholder. In the first situation there is no possible conflict of interest between the corporation and its stockholder; therefore, the corporation by its appeal fully protects its own interests and the interests of its stockholders. But in the second situation, which is the present situation, there is an obvious difference between the interests of the corporation and the interests of its stockholder. The corporation ordered to retain the money has no such vital interest in seeing that it is made available for payment to its stockholders as have the stockholders. Also, the corporation may be met on its appeal with the defense that it has suffered no injury since it has been ordered to retain money rather than pay it out.¹

¹ In fact, that very question was raised in this Court recently on the oral argument of *Northwestern Electric Co. v. Federal Power Commission*, 321 U. S. 119 (1944). As appears from the stenographic transcript of the argument, a Justice of this Court inquired how Northwestern Electric Co. (which is another subsidiary of American) could complain that a Federal Power Commission order deprived it of property when the effect of the order was to order Northwestern to retain certain amounts instead of paying them out in dividends to American. That point was met by informing the Court that American was a petitioner for review as well as Northwestern. But by the order below in the present case American is being deprived of the right similarly to protect its interests in the present case.

The respondent, on page 12 of its Brief in opposition to the petition to this Court for a writ of certiorari said:

"We do not, of course, question the fact that petitioner as the sole stockholder of Florida has an economic interest as substantial as that of Florida. Nor do we question the fact that the term 'person aggrieved' is broad enough to include the economic interest of a stockholder as a 'person aggrieved' by an order affecting his company wherever the circumstances are such as to make it inequitable that the stockholder be bound by the action or inaction of the management."

We submit that that concession alone is enough to require reversal by this Court of the order of the Court below dismissing American's Petition for Review.

The Court below, "legislated" by imposing on Section 24(a) an exception which Congress did not place there, namely, the exception that where a corporation files a petition for review as an "aggrieved" person or party, a stockholder may not file such a petition for review even if he is also an "aggrieved" person or party.

The decision below erroneously substituted, for the words and intent of the Act, the rule of judicial decisions governing the standing of minority stockholders to maintain independent actions on behalf of their corporations. That rule is inapplicable because (1) the statute clearly gives to any aggrieved party the right to judicial review of the administrative exercise of the comprehensive regulatory powers conferred upon the Commission, (2) in this case American as the sole stockholder suffers the deprivation of dividends and loss in value of its stock, both of which are peculiar to it, and (3) American, as the possessor of an interest which made it an actual, necessary and proper party to the administrative proceedings, is a party most directly aggrieved.

(1) The error of the Court below, in reasoning to a complete disregard of the language of the statute, is highlighted by reliance on inapplicable judicial authority. For instance, the Court, after adverting four times to *Pittsburgh and West Virginia Ry. Co. v. United States*, 281 U. S. 479 (1930), and after quoting from that opinion (R. 22), said:

"It is true that the Urgent Deficiencies Act, under which review of the order of the Interstate Commerce Commission was sought in *Pittsburgh & West Virginia Ry. Co. v. United States*, does not provide, as does § 24(a) of the Public Utility Holding Company Act, that 'any person or party aggrieved' may seek a review of the administrative order, but leaves the moving party's standing to seek review to be determined upon general principles." (Italics supplied.)

Contra the opinion below (R. 23), if the Congress had intended to leave the moving party's standing to be determined on general principles, it obviously would have followed the pattern of the Urgent Deficiencies Act (38 Stat. 219). But it did not.² This Court in *Federal Power Commission v. Pacific Power & Light Company*, 307 U. S. 156, 159 (1939), noted that with respect to the review provisions of the Federal Power Act (49 Stat. 860) the Congress had departed from the provisions of the Urgent Deficiencies Act and said (p. 159):

² The intention of the Congress to depart from the rules governing derivative and independent actions by minority stockholders is evidenced by the legislative history of the Act. The Act as originally introduced in both Houses of the 74th Congress, First Session, Senate Bill 1725, Section 24(a) and House Resolution 5423, Section 23(a), provided as to review: "Any person aggrieved by an order issued by the Commission in a proceeding under this title to which such person is a party may obtain a review of such order." Thus, in the bill as introduced, review was restricted to a party to the administrative proceeding. Congress was not content with this and as a result the section was changed, so that in the Bill as finally passed by both Houses, persons not parties who were aggrieved by an order were not left without redress but were entitled to judicial review.

... the Power Act contains a distinctive formulation of the conditions under which resort to the courts may be made and Congress determines the scope of jurisdiction of the lower federal courts."

Thus, the formula deliberately chosen by Congress must govern the whole matter of judicial review here, as in the above cited case, since the Congress in the Act now before the Court followed substantially the pattern of the Federal Power Act.

The Court below relied heavily on the case of *Pittsburgh and West Virginia Ry. Co. v. United States*, 281 U. S. 479 (1930), *supra*, notwithstanding the difference between the language of the Urgent Deficiencies Act and that of Section 24(a) and applied the ordinary "standing to sue" doctrine in the present case. The Court below instead should have followed the later decision of this Court in *Interstate Commerce Commission v. Oregon-Washington Railroad & Navigation Co.*, 288 U. S. 14 (1933), which involved a statute similar to Section 24(a) giving "aggrieved" parties the right to appeal. In that case, this Court held that persons who had been permitted to intervene in the proceedings below were entitled to appeal, notwithstanding that the original party (the United States) refused to appeal. The decision was unanimous on the right to appeal since the majority decided against the appellants on the merits and the dissenting three justices were of the view that the appellants should have a decision, on the merits, reversing the order appealed from. This Court thus held inapplicable, under a statute giving "aggrieved parties" the right to appeal, the "standing to sue" doctrine applicable to ordinary lawsuits and as applied to efforts to bring independent suits in *Pittsburgh and West Virginia Railway Co. v. United States*, *supra*, and in *Alexander Sprunt & Son, Inc. v. United States*, 281 U. S. 249 (1930).

The petition in *Northwestern Electric Company and American Power & Light Company v. Federal Power Commission*, 321 U. S. 119 (1944), was filed in the Circuit Court of Appeals and in this Court under the "person or party aggrieved" provisions of the Federal Power Act. As in this case, so in *Northwestern*, an order had been directed by the Federal Power Commission against an operating utility, all of whose common stock is owned by American Power & Light Company, Petitioner here. American joined with Northwestern in an application for a review by this Court of that order. The application was granted and argument later had thereon on behalf of both petitioners. The decision of this Court in that case commences with the words "petitioners" and the Court considered the position of American Power & Light Company as a sole stockholder.

In *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U. S. 470 (1940), the "person aggrieved or whose interests are adversely affected" provision (Section 402(b)(2), 48 Stat. 1064, 1093) of the Federal Communications Act was involved. In the *Sanders* case, this Court gave to a radio broadcasting licensee judicial review of the action of the Commission in granting a permit for the erection of a rival station on the basis that an economic injury was suffered by the licensee. Thus this Court gave effect to the purposes of the particular statute.

In *Associated Industries v. Ickes*, 134 F. (2d) 694, 702 (1943), the Circuit Court of Appeals for the Second Circuit construed the decisions of this Court to hold that under a statutory provision giving a "person aggrieved" the right to seek review, that person, in order to obtain review, need not have the "standing" required to bring an ordinary lawsuit. The *Associated Industries* case contains an exhaustive discussion of the right of review granted by such a statutory provision and points out how much broader

the right of appeal is in such cases than it is in ordinary lawsuits.³

(2) In disregard of Section 24(a) of the Act and in disregard of the difference in position of Florida and American, the Court below based its decision on the fact that Florida could and did file a Petition for Review of the identical order of the Commission. It is totally irrelevant that Florida, the operating company, was able to, could be compelled to, or did file a petition to review the order of the Commission. The impact of the order for every practical and significant purpose is directly upon American. Whether Florida did or did not pay dividends might be unimportant to Florida but the diversion to another purpose, by force of the Commission's order, of dividends available from current earnings by way of just return on American's substantial investment, does direct and irreparable damage to American.

In the *Northwestern* case, already mentioned, the Circuit Court of Appeals, 134 F. 2d 740, made this observation as to American's normal right to dividends on stock of the operating company (p. 744):

"While it might be said that American is not entitled to the earnings until declared as dividends, and therefore nothing has been taken from it, that view disregards *realities*. It is certainly possible, if not probable, that the market value of the stock would decrease, probably substantially, if no dividends can be paid thereon for ten years or more." (Citing *Kansas City So. Ry. v. United States*, 231 U. S. 423, 455.) (Italics supplied.)

³ It was also held in *Associated Industries v. Ickes*, *supra*, that a person who was properly made a party to an administrative proceeding was necessarily entitled to review the order made in that proceeding under a statutory provision giving a right of review to a person "aggrieved" (134 F. (2d), at pp. 708-12). This appears also to have been the rule in the Circuit Court of Appeals for the First Circuit, *Lawless v. Securities and Exchange Commission*, 105 F. 2d 574 (1939), until June 19, 1944, the date of the opinion below (R. 26).

Disavowal by the Commission that the motion to dismiss was a procedural step to render unavailable or weaken contentions which American, rather than Florida, should make, is futile when viewed in the light of the effect of the order dismissing American's petition. Whether the Commission intends to foreclose the contention available to American is of no moment so long as the result of the order may have that very effect. Willingness of the Commission to forego any objection to the possibility that Florida may contend for American that American is being improperly deprived of its property without due process, is without significance, if the question of the lack of interest of Florida in American's position can be raised by the Court itself as was done in the oral argument in this Court in the *Northwestern Electric Company* case already mentioned.

(3) The Court below erred also in disregarding the significance of judicial authority and administrative custom with respect to American's presence and participation as a party to the proceedings before the Commission.

An administrative order under the Federal Communications Act was involved in *Federal Communications Commission v. National Broadcasting Co.*, 319 U. S. 239 (1943), where this Court said at page 248:

"It would be anomalous if one entitled to be heard before the Commission should be denied the right of appeal from an order made without hearing."

It would be equally anomalous to deny judicial review to one brought to hearing by order of the Commission itself.

The decision of the Court below also conflicts with the following decisions heretofore referred to:

Interstate Commerce Commission v. Oregon-Washington Railroad & Navigation Co., 288 U. S. 14 (1933);

Federal Power Commission v. Pacific Power & Light Co., 307 U. S. 156 (1939);
Federal Communications Commission v. Sanders Bros. Radio Station, 309 U. S. 470 (1940);
Northwestern Electric Company and American Power & Light Company v. Federal Power Commission, 321 U. S. 119 (1944);
Associated Industries v. Ickes, 134 F. (2d) 694 (1943).

The custom of the Commission (which must have been based on administrative construction of the Act) in raising no objection to judicial review on behalf even of minority stockholders is illustrated in *Todd v. Securities and Exchange Commission*, 137 F. (2d) 475 (C. C. A. 6th, 1943) and *Lawless v. Securities and Exchange Commission*, 105 F. (2d) 574 (C. C. A. 1st, 1939). In those cases the Commission made no mention of the application of standards governing maintenance of actions by minority stockholders. The Commission now departs from its previous position, in a case involving the owner of all the stock, on the notion that venue may be duplicated if both American and Florida exercise their rights of review. There is nothing to that notion. Section 24(a) of the Act gives exclusive jurisdiction over all review proceedings to the Circuit Court in which the Commission files the transcript. *Associated Industries v. Ickes*, 134 F. (2d) 694 (C. C. A. 2d, 1943).

As to the suggestion (p. 11 of Respondent's Brief in Opposition to Petition for Certiorari) that to permit American to petition successfully for judicial review would be to permit it to pick the jurisdiction for litigation, it is settled that under the established procedure, the Commission could file the transcript with the Circuit Court of Appeals for the Fifth Circuit and, after such filing, the Circuit Court of Appeals for the First Circuit would transfer American's petition (if this Court reverses the order of

the Court below dismissing said petition and thus reinstates the petition) to the Fifth Circuit to be heard together with Florida's petition.

Columbia Oil & Gasoline Corporation v. Securities and Exchange Commission, 134 F. (2d) 265, 267, C. C. A. 3rd, January 25, 1943;

L. J. Marquis & Co. v. Securities and Exchange Commission, 134 F. (2d) 335, C. C. A. 2nd, February 4, 1943;

L. J. Marquis & Co. v. Securities and Exchange Commission, 134 F. (2d) 822, C. C. A. 3rd, March 23, 1943;

Koppers United Co. v. Securities and Exchange Commission, 138 F. (2d) 577, 578 (Ct. of App. D. C., October 11, 1943);

Hicks v. National Labor Relations Board, 100 F. (2d) 804, 805-6, C. C. A. 4th, January 9, 1939.

That American is a "person or party aggrieved" is obvious. Does American, a party whose contentions in the administrative proceedings were rejected, gain or lose as a result of the impact of the order sought to be reviewed? The answer is that it stands to sustain substantial loss. Its right to be heard, particularly and clearly given by Congress, is withdrawn by judicial decree erroneously entered. Thus, Petitioner is denied the benefits of constitutional due process.

CONCLUSION

It is respectfully submitted that the order of the Court below dismissing American's Petition for Review is erroneous and should be reversed.

Respectfully submitted,

A. J. G. PRIEST,

R. A. HENDERSON,

JAMES S. REGAN,

Attorneys for Petitioner,

Two Rector Street,

New York 6, N. Y.